WD No. 71299

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

LAKE OZARK/OSAGE BEACH JOINT SEWER BOARD, et al.

Petitioner-Respondents,

v.

MISSOURI DEPARTMENT OF NATURAL RESOURCES,

Respondent-Appellant.

Appeal from the Circuit Court of Miller County
Case No. 08ML-CC00106
Division 1

RESPONDENTS' JOINT REPLY BRIEF

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INTRODUCTION

In its brief, the Land Reclamation Commission (the "Commission") bases its arguments on distorted facts, incorrect reading of the law, and indefensible positions on various issues. For example, the Commission contends that the quarry application was "close enough" to satisfy the applicable Missouri statute, even though the applicant, Magruder Limestone Company ("Magruder"), has acknowledged the application did not comply with Missouri law. In fact, Magruder has filed a new application with the Commission to correct the deficiencies in its first application. Magruder did not file a brief with this Court and has abandoned its appeal. Despite Magruder's admission of an incorrect application, the Commission has chosen to appeal the Circuit Court of Miller County's ruling.

Throughout its brief, the Commission asserts the same stale arguments it propounded in the Circuit Court of Miller County. Unfortunately for the Commission, time has not cured defects in its arguments. This Court, like the Circuit Court of Miller County, should reverse the Commission's July 24, 2008 Order (the "Order"). The Commission's decision was flawed because it is:

- Unsupported by competent and substantial evidence upon the whole record;
- Unauthorized by law;
- Made upon unlawful procedure and without a fair trial; and
- Arbitrary, capricious, and unreasonable.

The deficient hearing process and subsequent Order resulted in prejudice to the Respondents. The prejudice amounts to reversible error and requires the reversal of Commission's decision to grant Magruder's permit.

ARGUMENTS

I. THE COMMISSION INCORRECTLY APPLIED THE BURDEN OF PROOF.

The Commission proffers several arguments for why its Order complies with Missouri law, but all of the justifications are based on an improper interpretation of Missouri law. For example, the Commission tries to support its Order by arguing:

- The Commission determined the weight and credibility of all witnesses and exhibits;
- The Hearing Petitioners did not establish issues of fact;
- The Commission rejected the opinion of the Sewer Board's Expert Witness; and
- The Commission included Special Conditions.

Unfortunately, all of these "arguments" are based on an improper application of the burden of proof and resulted from the Commission's failure to view the evidence under the proper "lens." The Commission's Order must be reversed.

A. The Statutory Burden of Proof

In any hearing held under the Land Reclamation Act, the burden of proof "shall be **on the applicant** for a permit." MO. REV. STAT. § 444.773.4 (emphasis added). No matter how much the Commission tries to distort these provisions, the clear and unambiguous language of the first sentence is "the burden of proof shall be on the applicant for a permit." *Id.* Even a cursory review of the Commission's Order clearly shows a misapplication of the burden of proof.

Respondents' position is further bolstered by reading the applicable regulations in harmony with the statute. Under the Land Reclamation Program's regulations, a petitioner has the burden of establishing "an issue of fact" regarding the impact of a permitted activity. 10 MO. CODE REGS. ANN. § 40-10.080(3)(B). Once Petitioners establish an issue of fact, "the burden of proof for those issues is on the applicant for the permit." 10 MO. CODE REGS. ANN. § 40-10.080(3)(B).

Despite the Commission's assertions in its brief, nowhere in the Commission's Order does it state that the Respondents failed to establish an "issue of fact." To the contrary, the Order repeatedly states that the Respondents failed to meet their burden of **proof**. *Legal File ("L.F."), at 914-917, 923, 927.* While the Commission would ask this Court to assume the Commission correctly applied "issues of fact and burden of proof," Missouri law does not permit such an assumption. *Fazior v. Heckler*, 760 F.2d 187, 188 (8th Cir. 1985) (finding that a court cannot assume an agency has correctly applied a burden absent explicit language). The Commission's Order must be reversed.

B. The Commission Perception of all Witnesses and Exhibits was Improper.

The Commission also attempts to support its Order by claiming it judged the "credibility" of all witnesses and evidence. However, if it evaluated witnesses and evidence under the wrong lens of the "burden of proof," its credibility judgments are irreparably flawed. As previously stated, the Commission improperly placed the burden of proof on Respondents. While the Commission may have "consistently applied" its

interpretation of the statute, as it claims, it "consistently applied" the wrong burden. For example, in its Brief the Commission contends:

> on the question whether the blasting could damage the sewer pipes or treatment plant, the Commission expressly accepted the testimony of experts that Magruder presented in its case-in-chief, even though the Commission consistently stated that the hearing petitioners had not met the threshold **burden of establishing an issue of fact** that triggered Magruder's burden of proof.

Commission's Brief at 18-19 (emphasis added). However, this contention is not reflected in the record. Nowhere did the Commission find that the Respondents failed to establish an issue of fact. In reality, the Commission's Order does not rest on the Respondents' alleged failure to meet the "threshold burden of establishing an **issue of fact**." Respondents established numerous facts, but the Order continually stated that Respondents failed to meet their burden of **proof** on the established facts. *L.F., at 914-917, 923, 927.* This misapplication of the burden of proof is error because Respondents did not have the burden of proof. The Commission's evaluation of the weight and credibility of each witness was flawed. The Order must be reversed.

In truth, the Commission's argument that the Petitioners failed to establish an issue of fact ignores the legal record and Missouri law. Even the Hearing Officer admitted that Respondents established an issue of fact. For example, the Hearing Officer stated:

> Mr. Mauer, the Hearing Officer is well-aware that if the 24 or the 18-inch mains break or if the plant itself suffers an event and discharges raw sewage into the Osage River that's not anything that DNR wants. And I don't think we need to find

> out whatever the standards would be. I think basic common knowledge of anyone would understand that.

Legal Record ("Leg. Rec."), Magruder Hearing Transcript 04-30-08, at p. 68: 2-9.[1]

This is not the only evidence showing Respondents established an issue of fact.

Similarly, Respondents established facts that the sewer lines and the treatment plant could be damaged by quarry operations. Respondents expert, Mr. Dressler, provided his opinion about potential damage from blasting. The Commission attempts to distort the record on this testimony. However, it is surprising that the Commission (like the Land Reclamation Program and Magruder before it) continues to ignore other "non-blasting" damage issues raised by Mr. Dressler (the only Missouri licensed engineer to testify in this matter). The sewer lines are a mere three feet under ground and "non-blasting" quarry activities pose a danger to the lines. These "non-blasting" quarry activities were not addressed by Magruder, the Land Reclamation Program or the Commission. While the Commission now claims that Mr. Dressler's testimony was unworthy of belief, neither the Commission nor the Hearing Officer entered any finding of fact stating Mr. Dressler's testimony on the "crush loads" did not establish an "issue of fact." The Commission cannot deny that Mr. Dressler's testimony established at least an "issue of fact."

Mr. Dressler testified that the sewer lines would break under the severe load that quarry trucks driving over the top of them would create. *Leg. Rec., Magruder Hearing Transcript 06-06-08, at 61:2-23; 135:16-136:18; Exhibit BP-25.* Instead of addressing

[1] To the best of Respondents knowledge, hearing transcripts were included in the Certified Legal Record filed with this Court, but were not included in the consecutively paginated, bound Legal File.

this issue, the Commission attempts to misconstrue Mr. Dressler's testimony related to blasting and to cast doubt on his knowledge of the Missouri Blasting Safety Act. The fact is, neither the Commission nor the Hearing Officer made a finding that Mr. Dressler's testimony on crush loads was unworthy of credibility. Mr. Dressler's opinion regarding crush loads and the danger to the pipes established an issue of fact by competent and substantial scientific evidence. *Leg. Rec., Magruder Hearing Transcript 06-06-08, at 135:16-136:18.* This testimony was unrebutted, neither Magruder nor the Land Reclamation Program contested this issue at the hearing. The Order must be reversed.

Similarly, the testimony of Mr. King and Mr. Hutchcraft is more than mere "conjecture" as claimed by the Commission. Mr. King's experience is so extensive, the Hearing Officer *sue sponte* recognized Mr. King as an expert in sewer lines and their maintenance. *Leg. Rec., Magruder Hearing Transcript 04-29-08, at pg 258:2-14.* Mr. King introduced real examples of pipe breaks previously experienced by the Sewer Board and the City of Osage Beach. *Leg. Rec., Magruder Hearing Transcript 04-30-08, at pg 148:23-157:11.* These scenarios were caused by factors that would be present everyday during the operation of the proposed quarry. No one disputed the impact on the Respondents' health, safety and livelihood.

Likewise, Mr. Hutchcraft's testimony was more than mere conjecture. After the Commission granted the permit (and during the Court imposed stay) Magruder was illegally blasting and caused damage to the sewer plants UV disinfecting system. This is precisely the concern that Mr. Hutchcraft identified during his testimony at the hearing.

Leg. Rec., Magruder Hearing Transcript 04-30-08, at pg 48:2-56:17. Mr. Hutchcraft's testimony was not conjecture, it actually happened. Both Mr. King and Mr. Hutchcraft established "issues of fact." Magruder, therefore, had the burden of proof, but did nothing to rebut this evidence.

Similarly, Mary Denton and Vicki Stockman established issues of fact. At the hearing, Petitioner Mary Denton, entered evidence from her doctor explaining:

> Exposure to both dust and diesel or other exhaust fumes are known triggers for this patient. A rock quarry in close proximity will certainly cause exacerbation and long-term worsening of her disease.

Leg. Rec., Magruder Hearing Transcript 03-24-08, at pg. 157:13-17. Under Missouri law, letters and reports from doctors (or experts) are sufficient scientific evidence to establish an issue of fact. *Knapp v. Missouri Local Gov't Employees Ret. Sys.*, 738 S.W.2d 903, 912 (App. Ct. 1987). The Commission now states that the doctor's report failed to establish that the doctor's opinion was based on any personal knowledge relating to the operation of the proposed quarry. This assertion is laughable because: it has no basis in the record; was never previously raised by the Commission; and is not Ms. Denton's burden. Ms. Denton met her burden, she established an issue of fact.

Finally, the Commission attempts to sidestep Ms. Stockman's testimony by claiming she failed to offer "competent and substantial scientific evidence" that dust from the quarry would migrate to her property or that her sewer lines would be damaged. *Commission's Brief, at 22*. Under Missouri law, Ms. Stockman was not required to address these specific areas. Ms. Stockman testified that her RV park's rating was

affected by the operation of a previous quarry and that the proposed quarry would have a similar impact on her livelihood. *Leg. Rec., Magruder Hearing Transcript 03-24-08, at pg. 88:24-89:8.* Lower ratings would equal less customers and less customers would equal less income for the Stockman's. Ms. Stockman established an issue of fact regarding the impact quarry operations would have on her livelihood. Magruder did nothing to rebut this. Clearly, Respondents repeatedly met their burden of established issues of fact. The only way the Commission could get around all of these unrebutted issues of fact is by relying on the wrong burden of proof. The Order must be reversed.

C. The Commission Included Special Conditions because of the Potential Impact to Health, Safety and Livelihood.

Finally, the Commission's inclusion of special conditions is a reason to reverse the Order, not a reason to grant the Order. At no point during the hearing had the idea of special conditions been raised and none of the parties introduced evidence to support special conditions. In fact, at the close of the Hearing, the Land Reclamation Program moved to recall Director Coen in order to "refine" his recommendation to the Commission and include potential special conditions. *Leg. Rec., Magruder Hearing Transcript 06-06-08, at pg 290:8-291:4.* Recognizing the lack of evidence regarding special conditions, the Hearing Officer denied the Commission's request. *Leg. Rec., Magruder Hearing Transcript 06-06-08, at pg 292:24-294:1.*

The first time any "special conditions" appeared was in the post-hearing "briefs" of Magruder and the Land Reclamation Program. Clearly this was a last ditch effort orchestrated by Magruder to get the permit issued. Significantly, Respondents were not

afforded the opportunity to investigate and/or address the proposed conditions. *L.F., at 828-840*.[2] Magruder's conditions were subsequently incorporated into the Order by the Commission. *L.F., at 824-828, 948-949*.

The Commission's inclusion of special conditions in their Order is a tacit admission that Magruder's proposed quarry would unduly impair the health, safety and livelihood of the Respondents. Rather than deny the permit, the Commission took it upon itself to impose "special conditions" that: had not been discussed during the course of the hearing; were not based on evidence in the record; and which Respondents were not allowed to address. The Order must be reversed.

II. THE COMMISSION RELIED UPON UNSCIENTIFIC EVIDENCE NOT IN THE RECORD.

In its brief, the Commission admits that it cited unscientific evidence not contained in the record, but attempts to excuse its error by claiming the citation was for "limited" description purposes. *Commission's Brief, at 28*. Such a contention is not reflected in the record and is contrary to the Commission's subsequent actions in this case.

One primary issue in this case was whether Magruder could safely operate a quarry in close proximity to sewer lines and sewer treatment plant. Given the importance of this issue, evidence related to blasting, quarrying activities and the impact on the sewer plant and sewer lines was hotly contested. Magruder attempted to address this issue with

[2] The Hearing Officer's Order on Respondents Motion to Strike or Leave to File a Post-Trial Brief was inadvertently left out of the Legal File. Said Motion was denied by the Hearing Officer and Respondents were not afforded the opportunity to submit any evidence regarding the "special conditions."

experts testifying about blasting. However, none of Magruder's three expert witnesses could offer opinions with respect to the ability of the two sewer lines (ductile iron pipe and pvc pipe) to withstand quarry operations. *Leg. Rec., Magruder Hearing Transcript 05-23-08, at 269:3-13*; *Leg. Rec, Magruder Hearing Transcript 06-04-08, at 252:19-253:20; 125:8-9*. The Hearing Officer recognized this gaping hole in Magruder's case. To fill it, he went outside of the record to find evidence that was applicable to the specific point on which Magruder's experts could not testify. *L.F., at 857*.

It should be noted, the Hearing Officer, a skilled lawyer, did not state the *Wikipedia* citation was provided for reference on sewer pipes, nor did he state it was background information to provide only context. To the contrary, the Hearing Officer affirmatively stated that he included the evidence to help the Commission because it was an area in which the experts "provided little." *L.F.*, at 857. The Commission clearly included information on the durability of the sewer pipes, because Magruder had no witness that could dispute this issue of fact raised by Respondents.

Further, the Commission's subsequent acts in this matter show the importance the Commission placed on the improper *Wikipedia* reference. Respondents informed the Commission of the *Wikipedia* citation at the July 23-24, 2008 meeting. At the time the issue was raised, the Commission had not yet issued its final Order. After being given the chance to explain himself, the Hearing Officer stated that if the Commission wanted to, it could take the *Wikipedia* information out of the Order. *L.F.*, *at 857*. The Commission affirmatively chose to leave the information in the Order, because it deemed it material to their decision. *L.F.*, *at 889*. If the *Wikipedia* reference was insignificant, the

Commission could have easily changed its Order. It failed to do so. The Order must be reversed.

To "explain" this blatant error, the Commission now cites cases finding that *Wikipedia* may be used to "define terms." *Commission's Brief, at 28-32.* That is not what happened in our case. The cases cited by the Commission, reference *Wikipedia* for definitions on ancillary terms or information. For example, In *U.S. v. Bazaldua*, a criminal drug case reviewed for the application of sentencing guidelines, the court cited to *Wikipedia* to define "PIT Maneuver," the maneuver used by police to prevent Defendant from fleeing. 506 F.3d 671, 673 (8th Cir. 2008). Similarly, in *State v. Smother's*, this Court, in a footnote, cites to *Wikipedia* to define the term "Whizzinator" - ancillary information that was not in dispute. *Smother's*, 297 S.W.3d 626, at n. 1. Further, the Commission's cases relate to courts, which were not required to base their decision solely on scientific evidence in the record. However, the Commission is statutorily required to cite only scientific evidence on the record. MO. REV. STAT. § 444.773.4; 10 MO. CODE REGS. ANN. § 40-10.080(3)(D) (emphasis added).

Both Magruder and the Commission were afforded the opportunity to present evidence on this issue and both parties failed. Unlike the cases cited by the Commission, the Hearing Officer in this case admittedly cited *Wikipedia* to help the Commission make its decision because it was an issue on which Magruder's experts "provided little." *L.F., at 857.* Because the Commission's citations to an unscientific source outside of the record introduces primary evidence not addressed by Magruder's witnesses, the Commission's Order must be rejected.

III. THE APPLICATION PROCESS WAS CONTRARY TO MISSOURI LAW.

To support its position related to the improper application process, the Commission actually advocates for a departure from Missouri law. The Commission's argument is flawed and must be ignored.

A. The Commission's Argument Regarding no Harm to Respondents Is Irrelevant.

In defense of this position, the Commission essentially contends that its **own** requirements are not mandatory in the absence of some appreciable "harm" to Respondents. There is certainly no support in the statute for this position. Missouri law is clear, an application needs to be complete before the Applicant may publish notice. MO. REV. STAT. § 444.772.10. To be complete under the Land Reclamation Act an application:

- Shall be made on a form prescribed by the Commission and shall include the name of all persons with **any interest** in the land to be mined. MO. REV. STAT. § 444.772.2(1) (emphasis added);
- Shall include a **map in a scale and form specified by the commission by regulation**. MO. REV. STAT. § 444.772.3; and
- The mandatory map must include "the names of any persons or businesses having **any surface or subsurface interests in the lands** to be mined, including owners and leaseholders of the land and **utilities**." 10 MO. CODE REGS. ANN. § 40-10.020(2)(E)(2)(A) (emphasis added).

Only after the required map identifying all interests in land is submitted, is the application complete, which allows notice to be published. MO. REV. STAT. § 444.772.10. Even the Land Reclamation Program's staff members agree that an application needs to be complete before an applicant may publish notice. *Leg. Rec., Magruder Hearing Transcript 04-28-08, pg. 117:23-118:7*. Nowhere in the applicable statutes or regulations does it reference "harm" to others as a standard.

However, even under the Commission's propounded standard, the Respondents showed prejudice as a matter of fact. Magruder did not file a complete application until February 5, 2008, nearly ten months after the initial process started. *Exhibit APP-6.* Because of its prior incomplete application, Magruder published notice prematurely. After its premature notice, but before it filed a complete application, Magruder improperly excluded interested parties from participating in the hearing process. Incredibly, the Commission asserts that the parties who were precluded from participating in the hearing were not prejudiced. Such a contention is wholly unsubstantiated. In reality, it is undisputed:

- Potential petitioners were excluded from the hearing without the opportunity to be heard;
- They were improperly excluded; and
- Neither the Commission, nor the Land Reclamation Program know whether the proposed quarry would impact the petitioners health, safety or livelihood.

The Commission attempts to avoid this obvious prejudice by arguing the exclusion of the Miller County Board for Services for Developmentally Disabled, Lakeview Christian

Academy, Golden Age Activity Center, Concerned Citizens of Miller County and Ted Bax (an individual) was proper because they did not timely follow the required procedure to request a hearing. This argument misses the point because it ignores the fact that these petitioners were denied the opportunity to participate in the hearing only because Magruder was allowed to prematurely publish its notice. Had Magruder been required to publish notice after its application was completed (February 5, 2008), the potential petitioners' request for a hearing would have been timely. The Commission cannot interpret the statute to evade the unambiguous requirement of a complete application. Given the clear, unambiguous language, the Court cannot avoid the conclusion that the potential petitioners were improperly excluded from the hearing. The Order must be reversed.

B. The Commission's Construction of Missouri Law Is Incorrect.

Finally, the Commission argues that the word "shall" contained in § 444.773.1 does not mean "shall." *Commission's Brief, at 36-38*. For support, the Commission cites *Citizens for Envtl. Safety, Inc. v. Missouri Dep't of Natural Res.*, where the Court stated that whether the word "shall" is mandatory is a function of context. 12 S.W.3d 720, 725 (Mo. App. S.D. 1999). In that case, the Court explained that where the legislature fails to include a sanction, "shall" is directory, not mandatory. *Id.* The Commission's reliance on this decision is flawed because it fails to recognize that in the Land Reclamation Act, the word "shall" accompanies the denial of the permit. The Commission cannot pass the "red-faced" test to argue that the denial of a permit is not a sanction for failing to submit a statutorily compliant application.

In fact, the Commission's proposed construction is not only against the against the clear intent of Missouri law, it is also against the administrative agency's own interpretation. *Leg. Rec., Magruder Hearing Transcript 04-28-08, pg. 117:23-118:7.* A commonsense approach to the application process demands that Magruder, or any applicant, not be allowed to prematurely exclude interested parties before having satisfied statutorily imposed application requirements. The purpose of the statute is to protect Citizens. The Commission's interpretation would vitiate this purpose. Without a sanction for filing applications, there is no incentive for applicants to provide the statutorily required information. The Commission's Order must be reversed.

CONCLUSION

For the foregoing reasons, the Land Reclamation Commission's Order granting Magruder Limestone Company, Inc.'s application for a quarry permit in Miller County, Missouri should be reversed and the decision of the Circuit Court affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing has been mailed postage prepaid on this 22nd day of April, 2010, to:

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CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that pursuant to Rule 84.06(c), the foregoing Brief: (1) contains the information required by Rule 55.03; (2) the Brief complies with the limitations in Rule 84.06(b); and (3) contains 3,763 words from the Table of Contents through the Conclusion, as determined using the word-count program of Microsoft Word 2003. The undersigned counsel further certifies that the accompanying compact disk has been scanned and was found to be virus free.

_____

Attorney for Respondent